

No. 16,110

United States Court of Appeals  
For the Ninth Circuit

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JERRY LEE BIRDSONG and DENNIS BIRD-  
SONG, by and through their guardian  
ad litem, Ora Mae Birdsong, and  
ORA MAE BIRDSONG,

*Appellants,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

APPELLANTS' OPENING BRIEF.

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FILED

OCT 24 1958

PAUL P. O'BRIEN, JR., CL.



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**APPELLANTS' OPENING BRIEF.**

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**STATEMENT OF JURISDICTION.**

This is an appeal from an order of the United States District Court, for the Northern District of California, Southern Division, Honorable Louis E. Goodman presiding, dismissing the within action.

The case involves an action for wrongful death alleged to have taken place in the Veteran's Hospital, located in the City of Oakland, County of Alameda, State of California, on April 11, 1954, as a result of the negligence of the agents and employees of the defendant and appellee United States of America.

The basis for the jurisdiction of the United States District Court is found in 28 U.S.C.A. 1346(b) :

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law or the place where the act of omission occurred.

The basis for the jurisdiction of the United States Court of Appeals for the 9th Circuit is found in 28 U.S.C.A. 1291 :

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, The United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

**STATEMENT OF THE CASE.**

On April 11, 1954, Thomas William Birdsong died in the Veteran's Hospital located in the City of Oakland, County of Alameda, State of California.

Thereafter on April 10, 1956, plaintiff caused to be filed a complaint for wrongful death in the United States District Court for the Northern District of California, Southern Division. (T.R. pages 5-8.)

The Docket entries, as indicated in the transcript of record, pages 3 to 5, indicate that after the filing of the complaint various actions were taken by both parties until April 16, 1958, when the clerk of the District Court mailed notice that the matter would appear on the dismissal calendar pursuant to rule 14 of the Rules of Practice of the United States District Court for the Northern District of California.

On April 23, 1958, the Honorable Louis E. Goodman ordered the within matter dismissed for lack of prosecution. (T.R. pages 35-36.)

The question involved in this appeal is:

Did the Honorable District Court, Louis E. Goodman, presiding, err in dismissing the within cause?

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**SPECIFICATION OF ERRORS.**

Appellant respectfully urges that the Honorable District Court erred in the following respects:

That under all the circumstances of the case it was an abuse of discretion for the Honorable Court to dismiss this case for lack of prosecution.

**ARGUMENT.**

Rule 14 of the Rules of Practice, United States District Court, Northern District of California, provides as follows:

*Dismissal for Want of Prosecution*

At a time fixed by the court at least every six months, the clerk in open court, under the supervision of the master calendar judge, shall call all civil actions pending in which no steps have been taken for six months.

Notice of the calling shall be mailed to all attorneys of record. If none of the parties nor their attorneys appear, or if good cause for the lack of prosecution is not shown, the court may dismiss the action.

The question then is clearly presented:

Was good cause shown why no steps had been taken for six months in the within action?

Appellants earnestly and respectfully submit that good cause was indeed shown. The following facts as quoted from the affidavit of Jeremiah F. O'Neill, Jr., (T.R. pages 37-39) are uncontradicted, and indeed verified by the attorney for appellee during the proceedings on motion to set aside dismissals for lack of prosecution. (T.R. page 58.)

“That on December 17, 1957, your affiant wrote a letter to Mr. Frederick J. Woelflen, one of the attorneys for the defendant herein, requesting that depositions of the Custodian of Records of the Veteran's Administration Hospital and the doctors involved be taken, a copy of which letter is attached hereto and



incorporated herein by reference; that in said letter your affiant requested that he be advised whether the depositions could be taken by stipulation, or whether the United States Attorney's Office requests notice of depositions to be taken; that within a few days after sending the letter above referred to, your affiant received a telephone call from Mr. Woelflen to discuss the subject matter of the letter; that at said time Mr. Woelflen stated to your affiant that the defendant was willing to have the depositions taken by stipulation, but that the whereabouts of some of the doctors might not be known since the possibility existed that some of them were no longer with the Veteran's Administration Hospital; Mr. Woelflen further stated that because of this problem, it would probably take considerable time for him to locate the doctors and arrange for the taking of their depositions, and that he would contact your affiant when the same were arranged;

That relying upon the statements of Mr. Woelflen, your affiant inadvertently filed the case away, and due to the press of business, did not do anything further with reference to the taking of the depositions while waiting to hear further from Mr. Woelflen; that because of Mr. Woelflen's statement that considerable time would be necessary to contact the doctors, your affiant was not worried about the passage of time until the notification that the case would appear on the dismissal calendar; that at that time your affiant again telephoned Mr. Woelflen and was advised by him for the first time that the doctors were not available; that had your affiant known that the doctors were not

available, he would have proceeded with the deposition of the Custodian of Records of the Veteran's Administration Hospital, as well as taking investigative steps to locate the doctors;”

Mr. Woelflen himself verified the above statement. “I might state to Your Honor, what Mr. O'Neill said was correct, that in December he did call me and I said I would do something about it. During the press of my own business, I overlooked that.”

It is thus clear that the reason no steps were taken during the six months immediately preceding the dismissal hearing was that appellants were assured that the doctors would be made available for deposition without the necessity of formal notice; that appellee's counsel inadvertently neglected to procure the doctors for depositions; that appellants relied upon the assurances of appellee's counsel without any intent on their part to in any way delay or prolong the litigation.

Appellants realize that the general rule is that a dismissal for lack of prosecution will not be disturbed by the Appellate Court in the absence of a showing of an abuse of discretion on the part of the trial court. (*Boling v. United States*, 231 Fed. 2d 926.)

It would seem that where the delay or lack of prosecution stems from reliance by the appellants upon assurances by appellee, it is an abuse of discretion to penalize appellants therefor. Had appellants been aware that nothing was being done in the way of making the doctors available, appellants could have proceeded to take the deposition of the Custodian of

Records and the matter, having had action within six months, would never even have appeared on the dismissal calendar.

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### CONCLUSION.

It is respectfully submitted that the Honorable District Court erred in dismissing the within matter and appellants respectfully request that said dismissal be reversed so that the matter may be tried on its merits.

Dated, Oakland, California,  
October 22, 1958.

Respectfully submitted,  
KAISER & O'NEILL,  
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JEREMIAH F. O'NEILL, JR.,  
*Attorneys for Appellants.*

